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Altria Group Distribution Company, and
Altria Enterprises LLC

*** * * FILED UNDER SEAL * * ***

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: JUUL LABS, INC., MARKETING,
SALES PRACTICES, AND PRODUCTS
LIABILITY LITIGATION

This Document Relates to:

Pesce v. JUUL Labs, Inc., et al.

Case No.: 19-MD-02913-WHO

**ALTRIA'S *DAUBERT* MOTION
REGARDING PLAINTIFF'S
EXPERTS**

Hon. William H. Orrick

Date: To be determined
Time: To be determined

1 **PLEASE TAKE NOTICE** that on a date to be determined in Courtroom 2 of this Court,
 2 located at 450 Golden Gate Avenue, 17th Floor, San Francisco, California, Defendants Altria Group,
 3 Inc., Philip Morris USA Inc., Altria Client Services LLC, Altria Group Distribution Company, and
 4 Altria Enterprises LLC (“Altria”) will present its Motion to Exclude Certain Testimony of Dr. Minette
 5 E. Drumwright, Dr. Thomas E. Eissenberg, Dr. Neil E. Grunberg, Dr. Robert K. Jackler, Dr. Anthony
 6 R. Pratkanis, Alan Shihadeh, Dr. Jonathan Winickoff, and Dr. Judith Prochaska. Altria seeks an order
 7 excluding certain opinions of these witnesses under Federal Rule of Evidence 702.

8
 9 Dated: March 22, 2022

ARNOLD & PORTER KAY SCHOLER LLP

10 By: /s/ Angela R. Vicari

11 John C. Massaro (*admitted pro hac vice*)
 12 Daphne O’Connor (*admitted pro hac vice*)
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18 Attorneys for Defendants ALTRIA GROUP,
 19 INC., PHILIP MORRIS USA INC., ALTRIA
 20 CLIENT SERVICES LLC, ALTRIA GROUP
 21 DISTRIBUTION COMPANY, and ALTRIA
 22 ENTERPRISES LLC
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ISSUES TO BE DECIDED

1. Whether the Court should exclude certain marketing and causation opinions of Dr. Minette E. Drumwright, Dr. Thomas E. Eissenberg, Dr. Neil E. Grunberg, Dr. Robert K. Jackler, Dr. Anthony R. Pratkanis, Alan Shihadeh, Dr. Jonathan Winickoff, and Dr. Judith Prochaska because they employed no methodology to reach those opinions.

2. Whether the Court should exclude certain marketing and causation opinions of Dr. Eissenberg, Dr. Grunberg, Dr. Jackler, Dr. Pratkanis, Dr. Shihadeh, Dr. Winickoff, and Dr. Prochaska because they lack the requisite qualifications.

1 The Court previously expressed an interest in *Daubert* arguments that seek to exclude
 2 “testimony of significant experts” because those expert opinions “lack[] an accepted methodology.”
 3 Ex. 1 (Feb. 16, 2022 Civil Minutes) at 1. That is the case here. The Court should exclude the
 4 marketing and causation opinions offered against Altria by eight of the Plaintiff’s experts—Dr.
 5 Minette E. Drumwright, Dr. Thomas E. Eissenberg, Dr. Neil E. Grunberg, Dr. Robert K. Jackler,
 6 Dr. Anthony R. Pratkanis, Alan Shihadeh, Dr. Jonathan Winickoff, and Dr. Judith Prochaska (the
 7 “Experts”) because they employed no methodology to reach them.

8 The challenged opinions are similar for each of the Experts. They conclude, opine, or
 9 suggest that Altria’s provision of retail and distribution services to JLI and other JUUL-related
 10 conduct *caused an increase* in underage vapor use, underage JUUL use, underage access to JUUL
 11 or vapor products, and/or underage purchases of JUUL. These opinions fail under *Daubert* for the
 12 same reason as in the *Bain* case: the Experts did not use a reliable methodology when forming
 13 these opinions and instead relied upon speculation, assumptions, and subjective beliefs.

14 The Experts have submitted lengthy reports containing their generic opinions in this
 15 litigation. When addressing Altria, the reports largely summarize internal company documents,
 16 describe Altria’s relationship with JLI, and outline the retail, distribution, and other services Altria
 17 provided to JLI. While much of this discussion is improper narrative testimony, Altria recognizes
 18 the Court’s preference not to address those arguments at the *Daubert* stage and does not raise them
 19 here. *See* Ex. 1 at 1-2.

20 Instead, Altria seeks to exclude opinions and conclusions the Experts might attempt to offer
 21 at trial that would be based on Altria’s conduct and services, including that Altria caused an
 22 increase in sales of JUUL, increased underage access to JUUL, and/or increased use of JUUL or
 23 vapor products by underaged users. As set forth in Altria’s *Daubert* motion in *Bain*, which Altria
 24 incorporates herein by reference,¹ the Experts seek to offer these conclusions without undertaking a
 25

26 ¹ *See* Altria’s *Daubert* Motion Regarding Plaintiff’s Experts, ECF 2683 (Dec. 23, 2021). Altria also
 27 joined in the *Daubert* motions filed by JUUL Labs, Inc. (“JLI”). *See* Altria’s Notice of Joinder and
 28 Joinder in Defendant JUUL Labs, Inc.’s *Daubert* Motions, ECF 2758 (Jan. 1, 2022). Altria also
 repeats and incorporates all arguments previously asserted by JLI, as well as JLI’s *Daubert* motion
 in this case.

1 reliable methodology and without analyzing any sales data, market information, or any other data
2 relevant to the complex questions of market causation and market impact underlying their purported
3 conclusions. Instead, Plaintiff's Experts simply observe that certain services were provided and
4 then speculate that those services caused an increase in underage JUUL and vapor use, underage
5 access to JUUL, and/or underage JUUL purchasing without doing anything to test those
6 assumptions. This approach does not satisfy the admissibility requirements set forth in *Daubert* and
7 therefore Plaintiffs' Experts should not be permitted to offer these opinions at trial. *See* Altria's
8 *Daubert* Motion Regarding Plaintiff's Experts, ECF 2683, at 1-2, 9-11 (Dec. 23, 2021); Altria's
9 Reply in Further Support of Its *Daubert* Motion Regarding Plaintiffs' Experts, ECF 2875, at 1 (Feb.
10 14, 2022); Defendant JUUL Labs, Inc.'s Omnibus *Daubert* Motion to Exclude Fact Narrations and
11 Opinions Regarding Intent, State-of-Mind, and Legality, ECF 2708, at 3, 8-9 (Dec. 24, 2021);
12 Defendant JUUL Labs, Inc.'s Reply In Support of Omnibus *Daubert* Motion to Exclude Certain
13 Marketing Opinions, ECF 2885, at 11-12 (Feb. 14, 2022).

14 Plaintiff's Experts' failure to conduct any analysis that would test their assumptions and
15 speculation about market causation and market impact is perhaps unsurprising. The experience and
16 qualifications claimed by these Experts lie in unrelated areas and do not include any background in
17 economics, market behavior, econometrics, or similar fields relevant to the opinions challenged
18 here. *See* Altria's *Daubert* Motion, ECF 2683 at 2, 11-12; Altria's Reply in Further Support of Its
19 *Daubert* Motion, ECF 2875 at 2-4; Defendant JUUL Labs, Inc.'s Omnibus *Daubert* Motion, ECF
20 2708 at 17-20; Defendant JUUL Labs, Inc.'s Reply in Support of Omnibus *Daubert* Motion, ECF
21 2885, at 3, 4-5, 9, 29-30, 43.

22 In addition, three of the Experts—Dr. Grunberg, Dr. Prochaska, and Dr. Winickoff—offer
23 case-specific opinions in *Pesce* along with their generic opinions. These case-specific opinions,
24 however, incorporate and rely upon these experts' generic causation opinions. Ex. 2 (Grunberg
25 *Pesce* Report) at 1-2; Ex. 3 (Prochaska *Pesce* Report) at 3, 6, 8, 11; Ex. 4 (Winickoff *Pesce* Report)
26 at 6-7. Accordingly any "specific" opinions concerning Altria and the impact of Altria's services
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28

1 and conduct on underage JUUL and vapor use, access, and purchasing relevant to *Pesce* should be
2 excluded.

3 So too should any opinions where the Experts attempt to lump together the “Defendants”
4 when opining on what caused Plaintiff to begin or continue using JUUL products. Dr. Grunberg,
5 for example, states that [REDACTED]
6 [REDACTED] Ex. 2 (Grunberg *Pesce* Report) at 5 (emphasis
7 added); *see also, e.g.*, Ex. 3 (Prochaska *Pesce* Report) at 11 ([REDACTED]
8 [REDACTED]
9 [REDACTED]) (emphasis added); *id.* at 13 (similar). The defendants are
10 different parties and are alleged to have engaged in different courses of conduct. Indeed, Altria is
11 alleged to have been involved with JLI for only a portion of the relevant time period and not until
12 after *Pesce* claims he began using JUUL. Moreover, any causation conclusions that these experts
13 could offer that would apply to Altria—whether directed at Altria specifically or “Defendants”
14 generally—would be based on the generic opinions discussed above and fail under *Daubert*.

15 Dated: March 22, 2022

ARNOLD & PORTER KAY SCHOLER LLP

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28 ENTERPRISES LLC

CERTIFICATE OF SERVICE

I, Angela R. Vicari, hereby certify that on the 22nd day of March, 2022, I electronically filed the foregoing **ALTRIA'S DAUBERT MOTION REGARDING PLAINTIFF'S EXPERTS** with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notifications to all counsel of record.

By: /s/ Angela R. Vicari

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